ATTACHMENT 3

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of SBC Communications Inc.,	)	
Southwestern Bell Telephone Company,	)	CC Docket No. 00-65
And Southwestern Bell Communications	)	
Services, Inc. d/b/a Southwestern Bell Long	)	
Distance for Provision of In-Region	)	
InterLATA Services in Texas	)	

SUPPLEMENTAL COMMENTS OF AT&T CORP. IN OPPOSITION TO SBC'S SECTION 271 APPLICATION FOR TEXAS

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I. SBC DISCRIMINATES AGAINST CLECS IN THE PROVISION OF ADVANCED SERVICES

No development in Texas is more threatening to the future of telecommunications competition than SBC's accelerated roll-out of its offer of advanced services coupled with SBC's refusal to provide competitors with nondiscriminatory access to SBC's network elements needed to compete with that offer. Through this stratagem, SBC is leveraging its longstanding monopoly over local phone service into the market for provision of bundles of local voice services, data services, and – once its 271 application is approved – long distance services. SBC's avowed goal is to be the 'only carrier' that can mass-market that particular and highly desirable package to customers.[14] And if this Commission does not quickly put a stop to SBC's discrimination, SBC will surely succeed.

The key to SBC's strategy is its unique control over the customer's local loop. That lets SBC provision advanced services to its embedded base of voice customers with a minimum of cost and disruption. As this Commission has found, and as SBC freely concedes in its supplemental application, the provision of advanced services over the same loop as the customer currently uses for voice service is far and away the most economical, efficient, and trouble-free approach.[15] To be able to compete fairly with SBC, competitors need the same access to SBC's essential loop facilities that SBC has.

But SBC is adamantly refusing to provide that access. As discussed further below, each of the three strategies that CLECs seek to use to compete with SBC to provide advanced services

[14] See Pfau/Chambers Supp. Decl. ¶¶ 10, 56 (quoting SBC chairman Whitacre).

[15] See Line Sharing Order ¶¶ 32-56; Chapman/Dysart Supp. Aff. ¶¶ 8, 32, 36-37.

requires access to SBC's network elements, each is covered by sections 251 and 271, and each is being hindered, if not blocked altogether, by SBC's discriminatory conduct.

It is important to note at the outset, however, that the need for this Commission to put a stop to SBC's xDSL discrimination has grown only more urgent in the months since SBC filed its first Texas application. Project Pronto, which is SBC's avowed plan to become the "only" carrier able to offer residential customers "all the pieces" – voice and data – that they want,[16] is now galloping forward "ahead of schedule" and is on target to have 1 million DSL subscribers by year-end and the ability to offer service to 77 million customers by year-end 2002.[17] While SBC is concealing the exact number of subscribers it has signed up, it has made no secret of its success to date. As SBC's Chairman and Chief Executive Officer Edward Whitacre put it last month, "whatever number you think it is, it's a lot more than that."[18] Meanwhile, SBC reportedly has 9,000 representatives devoted to taking orders for DSL services – a work force that, if it focused on Texas for even one day, could far outstrip the 5,000 xDSL capable loops that it has taken all CLECs combined two years to achieve.[19]

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[16] See Pfau/Chambers Supp. Decl. ¶ 10, quoting SBC Pronto Press Release (Oct. 18, 1999).

[17] See Pfau/Chambers Supp. Decl. ¶ 57, quoting James D. Gallemore, EVP of strategic marketing, "SBC Cuts Price of xDSL Service," SBC News Release, San Antonio, Texas (Feb. 14, 2000).

[18] See Pfau/Chambers Supp. Decl. ¶ 56, citing RBOC Chiefs Stress Data Growth Potential, *Communications Daily*, March 10, 2000.

[19] See Pfau/Chambers Supp. Decl. ¶ 58, quoting Credit Suisse Analysts' Report; see SBC's Letter Br. 11 ("SBC has provisioned approximately 5,000 local loops for xDSL providers in Texas since August 1999").

To be sure, a rapid roll-out of advanced services to residential customers is a goal that everyone – including AT&T, other CLECs, the Commission and Congress – shares.[20] But more than one company needs to be able to participate. Indeed, the Commission made that very point when it barred both Ameritech and US WEST from becoming the only companies capable, in their respective regions, of offering customers the benefits of one-stop shopping for bundles of local and long-distance service.[21] As both the Commission and the Court of Appeals recognized, to grant a BOC the ability to create a unique bundled offer for which it is the "only source"[22] before that BOC had made all of its network elements fully and fairly available to competitors, would conflict fundamentally with the market-opening "incentive" that Congress intended section 271 to provide.[23] It is therefore critical to any evaluation of SBC's 271 application that this Commission consider all of the ways that SBC is discriminating against CLECs that need access to SBC's loop facilities to compete with SBC's bundled offer.

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[20] Indeed, AT&T has invested billions of dollars to acquire and upgrade cable facilities to support two-way communications of voice and data for residential consumers. But as the Commission well knows, this is not only an expensive but a long-term process that – even when fully realized years from now – will still not enable AT&T to reach even 30 percent of U.S. households. The ability to use UNE-P to offer residential customers a package of voice and data services is thus crucial to AT&T's ability to compete with SBC on a mass-market scale. See Tonge/Rutan Decl. ¶ 17.

[21] See Qwest Order, aff'd sub nom. U S WEST Comm., Inc. v. FCC, 177 F.3d 1057 (D.C. Cir. 1999) ("Qwest Appeal Order"), cert. denied, 120 S.Ct. 1240 (2000).

[22] Qwest Order ¶ 40; Brief for Respondents, filed in Qwest Appeal Order at 56-67.

[23] Qwest Appeal Order, 177 F.3d at 1060; see also Pfau/Chambers Supp. Decl. ¶¶ [52-54].

A. SBC Discriminates Against UNE-P CLECs And Denies Them Full Use Of The Unbundled Loop

AT&T's position is simple. When AT&T purchases the UNE-platform from SBC to serve an existing SBC residential customer, AT&T purchases, among other network elements, that customer's loop (and pays the full TELRIC-based rate). AT&T is therefore entitled to receive access to the full features, functions, and capabilities of that unbundled loop, so that AT&T can compete with SBC and provide the customer with data, as well as with voice, services.

Both the Act and this Commission's unbundling rules require incumbent LECs to provide this access to requesting CLECs. The Act itself defines the term "network element" to include the "features, functions, and capabilities that are provided by means of such [network element]." 47 U.S.C. § 153(29). The Act also requires incumbent LECs to provide "nondiscriminatory access" to their network elements so that CLECs can provide the "telecommunications service" they seek to offer. Id. § 251(c)(3); see § 251(d)(2); § 271(c)(2)(b)(ii), (iv). Synthesizing these statutory requirements, this Commission's unbundling Rule 307(c) states that:

> An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element. 47 C.F.R. § 51.307(c) (emphasis added).

Beginning with the Local Competition Order, moreover, this Commission has repeatedly held that this duty to permit CLECs access to the full capabilities of network elements to provide the services they wish applies directly to CLECs seeking to use unbundled loops to provide advanced services. Thus, in the Local Competition Order, the Commission ruled that incumbent LECs must "take affirmative steps to condition existing loop facilities to enable requesting

carriers to provide services not currently provided over [the loop] . . . such as ADSL." Local Competition Order ¶ 382. Similarly, in the BA-NY Order, the Commission held that:

> Bell Atlantic must also provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested.

BA-NY Order ¶ 271. And in the UNE Remand Order, the Commission defined the loop element to include:

> all features, functions, and capabilities of the transmission facilities, including dark fiber and attached electronics (except those used for the provision of advanced services, such as DSLAMs) owned by the incumbent LEC, between an incumbent LEC's central office and the loop demarcation point at the customer premises.

UNE Remand Order ¶ 167.

Moreover, and as discussed further below, the Act's nondiscrimination obligations provide an independent and equally compelling basis for requiring SBC to provide CLECs the ability to provide both voice and data services over existing loops. That, after all, is how SBC is marketing its own voice and data services. SBC therefore has an independent duty, under the non-discrimination obligation of section 251(c)(3), to provide UNE-P CLECs with comparable access.

SBC's latest application has been submitted in defiance of its explicit legal obligation to provide CLECs nondiscriminatory access to the full functionality of the loop. That application confirms – though without any acknowledgment by SBC – that it has now reversed course and abandoned its prior written promise to comply with the law on this point. Specifically, SBC responded to AT&T's concern by proclaiming to this Commission that "*AT&T is free to offer both voice and data service over the UNE Platform* or other UNE arrangements, whether by itself or in conjunction with its xDSL partner, I[P] Communications." SBC Reply Br. at 37 n.19.

SBC also reinforced the point by asserting that "[i]f CLECs chose to offer voice services, they could share the voice line *in precisely the same way as SBC*." Id. at 25 n.11 (emphasis added). SBC thus appeared – in one unequivocal stroke – to take this legal issue off the table in its first application.

If there were ever any truth to SBC's prior statement of position – and as the Pfau/Chambers Supplemental Declaration sets forth in detail, ¶¶ 20-28, it is difficult to believe there ever was – there is certainly none now. Within days of the submission of its Reply Comments, and in response to AT&T's requests for information as to how SBC planned to make its new pledge an operational reality, SBC's representatives were flatly denying that SBC had any such policy and have since consistently refused even to discuss ways in which AT&T or other CLECs could offer data services over loops obtained as part of the UNE-platform. Pfau/Chambers Supp. Decl. ¶¶ 22-28.

To the best of AT&T's knowledge, SBC has never expressly informed this Commission that it has withdrawn its concession in its Reply Comments.[24] But its new application makes its true position quite clear. SBC's proposed amendments to the T2A to state that the High Frequency Portion of the Loop ("HFPL"), which is the portion needed to offer data services, "is not available in conjunction with a combination of network elements known as the platform or UNE-P (including loop and switch port combinations) or unbundled local switching or any arrangement where SBC is not the retail POTS provider."[25] SBC's complete reversal of position

[24] Given SBC's practice of filing at least one and often multiple ex parte letters with this Commission each day and only erratically serving them on interested parties and/or posting them on its website, it is difficult for any third party to be sure that it is aware of everything that SBC has attempted to put into the record of this proceeding.

[25] T2A section 4.7.4, submitted as Attachment C to the Supplemental Declaration of Michael Auinbauh.

from its Reply Comments – and its unequivocal intent to deny UNE-P CLECs access to the full functionality of the unbundled loop – thus could not be more clear.

It is equally clear that the terms and conditions on which SBC is willing to let CLECs use its loops to provide both voice and data service are blatantly discriminatory. SBC's new position is that CLECs may offer voice and data only over a second loop, not over the customer's existing loop (which is provisioned in a UNE-P arrangement). The absurdity of this proposal is evident even on the face of SBC's new application. In the Chapman/Dysart Supplemental Affidavit, SBC's own witnesses take pains to explain that the discriminatory delays and equipment problems that SBC is currently imposing on data CLECs are attributable to the fact that data CLECs "must order a new, unbundled loop" from SBC, whereas SBC (and its affiliate, ASI) enjoy the luxury of providing data service "over an existing loop, i.e., the same loop used to provide voice grade services to the xDSL customer." Chapman/Dysart Supp. Aff. ¶ 32. This difference matters, because as Chapman/Dysart explain, "when ADSL is provisioned over a working loop, the continuity and use of the loop are already established" (id. ¶ 38), which is inherently not the case with a "new, unbundled loop." Id. ¶ 32; see id. ¶¶ 8, 35, 36; see also Pfau/Chambers Supp. Decl. ¶¶ 33-34. SBC's witnesses thus confirm that to relegate UNE-P CLECs to a second loop is to guarantee them a lower standard of performance than either SBC, SBC's data affiliate, or data CLECs who obtain line sharing, will enjoy. See id. ¶¶ 29-36.

Moreover, the discrimination will not be limited simply to delayed provisioning and non-working loops. Use of second loops will cost UNE-P CLECs more, because of numerous additional service orders, provisioning work, and charges that SBC's proposal would impose. Id. ¶¶ 30, 37. And all of this expense, complication, and delay comes before the final coup-de-grace. In order to disconnect the customer's inside wire from the existing line and reattach it to

the "new" line, SBC's proposal would require that a technician perform work at the premises of each new residential customer. Id. ¶ 31. In short, the costs and burdens of SBC's proposed alternative would prohibit its use on any significant scale. Indeed, this is simply a sequel, in the context of xDSL, to SBC's protracted and unsuccessful attempt to overturn this Commission's Rule 315(b) and thereby deny competitors the right to obtain combinations of network elements that SBC had not previously ripped apart. Were SBC to succeed this time, it would become the only carrier in its region capable of mass-marketing bundles of voice and data services to residential customers.

SBC's discrimination against UNE-P CLECs does not stop here. SBC is not content simply to block AT&T from offering its own voice/data package to residential customers. SBC also prevents AT&T from providing *voice service alone* through the UNE-platform to customers who are receiving SBC's xDSL service. As AT&T discussed in its opening comments (at 12-13), if AT&T wins a voice customer from SBC who has subscribed to SBC's xDSL service, SBC will force that customer to give up SBC's xDSL service unless the customer switches voice service back to SBC. Since SBC has already ensured that AT&T cannot respond with a competing offer of data service, SBC has effectively quarantined all of its xDSL customers from voice competition from AT&T.

This practice is as unlawful as it is anticompetitive. See AT&T Comments at 18-21. And its competitive impact is severe. SBC is exploiting its monopoly control over essential xDSL-related inputs to block competition not just for bundled voice/data packages, but for local voice services alone. As this Commission recently confirmed in the UNE Remand Order (see id. ¶¶ 253, 273, 296) carriers have no practical alternative today to the UNE-platform if they wish to mass-market local voice service to residential customers. By rapidly signing up thousands of

residential customers for xDSL service each week throughout its region, then refusing to let those customers switch their voice service to AT&T, SBC is leveraging its local monopoly to destroy local voice competition as well.

There is no technical justification for SBC's intransigence. As the Pfau/Chambers Supplemental Declaration explains (¶¶ 43-47), SBC can enable a UNE-P carrier to provide voice and data over the customer's existing loop by using virtually the same procedures that it will use to provide line-sharing to other carriers. There is also no legal justification. Indeed, the only legal argument that SBC has ever intimated that it would raise in this context is an obvious non-sequitur.

SBC's legal position apparently rests solely on one sentence of the Line-Sharing Order, which states that "incumbent carriers are not required to provide *line sharing* to requesting carriers that are purchasing . . . the platform." Line Sharing Order ¶ 72 (emphasis added). The short answer to this argument is that AT&T is not requesting "line sharing" at all.[26] Indeed, far from wanting to "share" the line with SBC, AT&T wants the whole line to itself, voiceband and high frequency, so that it can offer a bundled package of voice and data to compete head-to-head with SBC. In asking for this access, AT&T is thus demanding only what the Act and this

[26] Line sharing involves having the incumbent provide the voice service, while the CLEC provides the data services, on the same loop. See, e.g., Line Sharing Order ¶ 4 (line sharing requirement provides access to "the high frequency portion of the local loop" so that the competitive LECs can "compete with incumbent LECs to provide to consumers xDSL-based services through telephone lines that the competitive LECs can share with incumbent LECs"); id. ¶ 13 (line sharing requirement "permit[s] competitive LECs to provide xDSL-based services by sharing lines with the incumbent's voiceband services").

Plainly, AT&T is not seeking line sharing. It does not want SBC to provide the "voiceband service" on the line, and it does not want just the "high frequency portion of the loop" in order to compete just for data services. In contrast to line sharing, AT&T wants access to all of the loop so that AT&T can arrange for the provision of both voice and data services, which leaves nothing of the loop to "share" with SBC at all.

Commission's rules have long required – that SBC make available to AT&T the full functionality of the loop so that AT&T can provide the "services it seeks to offer" (§ 251(d)(2)(B)) – both voice and the data services – over that line.

B. SBC Discriminates In The Provision Of Line Sharing

The second CLEC strategy for offering xDSL services to consumers involves line sharing. See note 26, supra. Here, too, SBC is starkly discriminating against its competitors. Today, SBC is providing its own data affiliate, ASI, with "interim line sharing." SBC Letter Br. 15. SBC thus allows ASI to provision data services to SBC's embedded base of millions of local voice customers over the same working phone lines those customers now use.

By contrast, SBC denies unaffiliated CLECs any access whatsoever to line sharing. SBC admits that it will not provide unaffiliated CLECs with line sharing until "May 29, 2000" at the earliest. Cruz Supp. Aff. ¶ 17. At least until then, CLECs that wish to compete with SBC's affiliate must make do with ordering a second line which, as discussed above, SBC concedes cannot be provided at a level of quality equal to that of line sharing.

Thus, SBC's affiliate now enjoys access to SBC's unbundled loops that is different – and of higher quality – than what SBC affords competitors. Under the plain terms of sections 251(c)(3), this is discrimination, pure and simple.

None of SBC's purported justifications has merit. First, SBC claims that it need not provide line sharing to unaffiliated CLECs today because the Line Sharing Order does not require line sharing until June 5, 2000. See SBC Letter Br. 16. This argument fails, however, for the obvious reason that, in this proceeding, SBC's obligation is to demonstrate compliance not simply with the terms of the Line Sharing Order, but with the nondiscrimination and other requirements of section 271. Furthermore, nothing in the Line Sharing Order either (1) prohibits incumbent LECs from complying with their line sharing obligations prior to June 5, 2000, or